call on Mr C Das, counsel for the first respondent and Mr Varghese George, counsel for the second respondent, to address us. For the reasons stated above, we dismissed the appeal but made no order as to costs after hearing the brief supplicatory address of Mr Ananthan who informed us that the members of all the appellants are not people of means but are only wage earners.

Appeal dismissed.

Solicitors: *Skrine & Co; Shook Lin & Bok; Zain & Co.*

Reported by *Prof Ahmad Ibrahim*

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 220 OF 1987
LEE HUN HOE CJ (BORNEO), HASHIM YEOP A SANI AND MOHAMED YUSOFF SCJJ
26 JULY 1989

Contract - Guarantee - Demand for payment - Whether carbon copies of demand meant for borrower sent to guarantors constitute proper demand

Banking - Loan - Guarantee - Demand for payment - Whether carbon copies of demand meant for borrower sent to guarantors constitute proper demand

The respondents in this case were bankers and had granted to a housing developer an overdraft facility of $100,000. The said facility was secured by joint and several guarantees of the directors of the housing developer, including the appellant. The housing developer defaulted and was in breach of the said facility. The respondents sent a demand letter to the housing developer requesting it to settle the excess and to regularize the account. Carbon copies of the said letter were sent to all the guarantors including the appellant. The notice was ignored and the respondent filed an action against the housing developer and the guarantors. The appellant filed a defence to the effect that no formal letter of demand was served on him and therefore the respondents have no cause of action against him. The senior assistant registrar gave him unconditional leave to defend. On appeal the learned judge of the High Court allowed the appeal. The appellant appealed to the Supreme Court.

Held, allowing the appeal: The learned judge was wrong in holding in this case that no antecedent demand was required to create a cause of action and that the mere filing of the writ and the service thereof was a sufficient demand obliging the appellant to pay. Here the letter of guarantee is clear. A proper demand must be made and it is a condition precedent to establishing a claim against a guarantor.

Cases referred to

1 *Royal Bank of Canada* v *Oram & Ors* [1978] 1 WWR 564 (refd)
2 *Royal Bank of Canada* v *Ruben* [1978] 48 APR 707 (refd)
3 *Mok Hin Wah* v *UMBC* [1987] 2 MLJ 610 (follid)
4 *United Prime Corporation Berhad* v *Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 (distd)
5 *Bradford Old Bank Ltd* v *Sutcliffe* [1918] 2 KB 833 (refd)
6 *Esso Petroleum* v *Alstonbridge Properties* [1975] 1 WLR 1474 (refd)
7 *Public Bank* v *Chan Siok Lee* KL High Court Civil Suit No 3599 of 1985 (refd)

Lambert Rasa-Ratnam for the appellant.
JJ Sugunasingam for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal. We now give our reasons. This appeal is concerned with the question of the requirement of a proper demand to be issued to a guarantor.

The facts may be stated shortly. The plaintiffs are bankers and the first defendant is a housing developer. The plaintiffs granted the first defendant an overdraft facility of $100,000. Interest was to be at the rate of 15% pa with monthly rests. The said facility was to be regularized by the first defendant upon demand by the plaintiffs. The said facility was secured by joint and several guarantees of the second, third, fourth and fifth defendants who were directors of the first defendant. The guarantees were given in their personal capacities. The first defendant defaulted and was in breach of the said facility. Despite several reminders requesting the first defendant to adjust the said facility the first defendant failed to do so. By a demand letter dated 18 December 1982 the plaintiffs requested the first defendant to settle the excess and also to regularize the account within seven days. In the said letter the plaintiffs gave notice that if the demand was not complied with they would instruct their solicitors to proceed with legal action against the first defendant and the other defendants. Carbon copies of the said letter was sent to each of the other defendants. All the defendants ignored the said notice. The plaintiffs then filed an action against them claiming the sum of $120,409.13 as at 28 February 1983 with interest thereof at the contractual rate. Judgment in default was obtained against the first, second, fourth and fifth defendants. The third defendant filed a defence to the effect that no formal letter of demand was served upon him and therefore the plaintiffs had no cause of action against him. The senior assistant registrar gave him unconditional leave to defend. In allowing the appeal the learned judge said he was not impressed with his line of argument. Thus the matter came before us.

The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by

the creditor, and cannot be made liable for more than he has undertaken.

Counsel for the third defendant cited two Canadian cases, ie *Royal Bank of Canada* v *Oram & Ors*[1] at p 569 and *Royal Bank of Canada* v *Ruben*[2] at p 708 to support his proposition that whether a prior demand is a condition precedent to the creation of liability in a guarantor depends on the precise terms of the contract. The learned judge accepted that the two Canadian cases brought out the proposition clearly. However, he pointed out that in the first case at p 569 the guarantee contained the following words:

> No suit based on the guarantee shall be instituted until demand of payment has been made ...

The same form of words also are to be found in the second case. As there are no such words in the letter of guarantee signed by the third defendant the learned judge did not consider the proposition carried the matter very far.

After the learned judge had made his decision the third defendant filed his appeal. In 1987 *Mok Hin Wah* v *UMBC*[3] was decided by this court. The third defendant sent a copy of this decision to the learned judge. There the plaintiff brought a claim for money lent to the first defendant under certain overdraft facilities and interest thereon. The loans were guaranteed under continuing guarantees and indemnities by the other five defendants. When the defendants defaulted in payment the plaintiff sued them. Judgment was given in favour of plaintiff. The defendants appealed.

Like our case, the notice of demand was sent to the principal debtor while the guarantors received only carbon copies of the said notice. Like our case, the main issue was whether the notice sent by the plaintiff was a proper demand under the guarantees. In allowing the appeal, Salleh Abas, then LP, delivering the judgment of the court held that the notice of demand in this case was made only to the principal debtor and not to any of the guarantors. Further, it was held that since the bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but made the demand a condition precedent to suing the guarantor. At p 610 he stated:

> ... In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors. Sending a carbon copy of it as in this case is not enough. It is also not sufficient to send carbon copies of the notice meant for the borrower as in the case of *United Prime Corporation Berhad* v *Q-Built Construction (M) Sdn Bhd & Ors*[4] with words 'This is a demand upon you' written against the names of the guarantors appearing in the bottom of the notice ...

He went on to say:

> The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under cl 1 the guarantors are to pay 'on demand all money which now is or may during the continuance of the agreement be owing to you from the customer(s) ...'. Clause 4 requires the sum guaranteed or any balance thereof to be paid with interest from the date of demand for the payment thereof. It is also stipulated at cl 11 that any demand in relation to matters aforesaid may be effectively given or made by any officer of the bank, either served personally on the guarantors, or sent by post to or at their last known place of business. (See *Bradford Old Bank Ltd* v *Sutcliffe*[5]).

Where an obligation exists by virtue of a covenant, its extent is to be measured only by the words of the covenant. A guarantor must never be made liable beyond the precise terms of his commitment. This is important because the language of guarantees and their subject matter and the surrounding circumstances differ almost in every case.

The learned judge tried valiantly to distinguish the facts of the instant case with *Mok Hin Wah's* case.[3] He assumed that the guarantee did provide in so many words, that no suit based on the guarantee shall be instituted until demand of payment had first been made, or alternatively that there was no provision in that agreement whereby the guarantors were to be treated as principal debtors, with the result that their liability was only collateral. He referred to a passage in the judgment of Scrutton LJ at p 848 in *Bradford Old Bank Ltd* v *Sutcliffe*[5] to show that what is critical is the language of the instrument and the nature of the liability which it creates. The observation of Walton J at p 1483 in the case of *Esso Petroleum* v *Alstonbridge Properties*[6] at p 1483 was also cited in support. Lastly, he referred to his decision in *Public Bank Bhd* v *Chan Siok Lee*[7] where there was no dispute that the guarantors were served with the proper demand.

With respect, we are unable to accept the learned judge's construction of the guarantee and therefore we do not support his decision. The facts in the instant case are almost on all fours with those in *Mok Hin Wah's* case[3] which laid down the law very clearly and should be followed. The document in question, that is, the letter of guarantee signed by the third defendant, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used. This intention is best ascertained by looking to the relative position of the parties at the time the letter of guarantee is written. Constructing this guarantee according to the principle stated above we do not doubt that it is a continuing guarantee subject to a certain limit.

Under cl 1 the third defendant stipulates to pay the plaintiffs on demand 'all moneys which now are or may during the operation of this agreement be owing to you from the customer ... including interest ... although the relationship of banker and customer may have ceased.' Clause 4 says this is a continuing guarantee and makes clear that the guarantor is liable to the sum claimable but

subject always to the limit of $100,000 from the date of his receiving demand for payment thereof. Clause 10 provides that any demand for payment under the guarantee may be made by any officer of the bank or the bank's solicitors by letter sent by post addressed to the guarantor at his specified address or his last place of business or abode. It is true that cl 14 makes each guarantor a principal debtor. But this does not mean that the guarantor is not entitled to a proper demand. After all, the first defendant, the principal debtor, was served with a proper demand. Why should the guarantors to be treated as principal debtors, not be served with the proper demand?

We are unable to agree with the views of the learned judge in this case that no antecedent demand was required to create a cause of action and the mere filing of the writ and the service thereof was a sufficient demand obliging the third defendant to pay. Here the letter of guarantee is clear. A proper demand must be made. It is a condition precedent to establishing a claim against a guarantor.

Appeal allowed.

Solicitors: *Skrine & Co*; *Adam & Co.*

Reported by *Prof Ahmad Ibrahim*

Yeap Leong Huat v Yeap Leong Soon & Anor and another application

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEALS NOS 30 AND 31 OF 1988
LEE HUN HOE CJ (BORNEO), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
24 JULY 1989

Family Law - Chinese customary marriage - Marriage with principal wife - Whether wife principal wife or secondary wife

Succession - Bequest to children of son from principal wife - Whether wife principal wife or secondary wife

Civil Procedure - Appeal - Finding of facts by trial judge - Inferences from established facts

One Yeap Chor Ee left a will wherein he gave bequests to the male children of his son Yeap Hock Hoe 'by wife Kim Lian or his principal wife for the time being to whom he shall be married after the date of this my will'. The facts showed that Yeap Hock Hoe met Yap Kim Lian and took her as his secondary wife in 1944. She bore him two daughters and four sons. During this time Yeap Hock Hoe had a principal wife, Hooi Kum Chee, who lived with him in the family house, 'Homestead'. Yap Kim Lian and her children lived outside. Hooi Kum Chee died in 1948 and some three years after her death Yeap Hock Hoe married her sister Hooi Sooi Wan. The marriage was conducted in Homestead according to Chinese rites and custom in the presence of Yeap Chor Ee and his wife Lee Cheng Kim, the father and mother of Yeap Hock Hoe. Yeap Chor Ee died in 1952 and left a will made in 1950. In 1980 Yeap Hock Hoe died. The plaintiffs, the children of Yeap Hock Hoe and Hooi Sooi Wan claimed to be entitled to share in the residuary estate of the testator. The learned trial judge found on the evidence that Hooi Sooi Wan was the principal wife of Yeap Hock Hoe and therefore the plaintiffs were entitled to take under the will of Yeap Chor Ee. The appellants appealed. The findings of the learned judge was attacked on two main grounds: (1) that the learned judge was wrong to say that Yap Kim Lian was not the principal wife merely on the ground that she did not live in Homestead and (2) the learned judge was wrong to hold that Hooi Sooi Wan was a principal wife as the marriage ceremony held on 22 December 1957 was appropriate to the marriage of a principal wife.

Held, dismissing the appeal:

(1) There was ample evidence on which the learned judge could reach the conclusion which he did that Hooi Sooi Wan is the principal wife of Yeap Hock Hoe and therefore the plaintiffs-respondents are entitled to share in the residuary income of the estate of the testator.

(2) According to Chinese custom a man can have one principal wife at any one time. There cannot be two principal wives existing at the same time. But he can have one or more secondary wives without a principal wife. When Hooi Kum Chee died Yeap Hock Hoe lived at the family house Homestead without a principal wife. Yap Kim Lian was acknowledged as a secondary wife at that time. When Yeap Hock Hoe married Hooi Sooi Wan, she then became his principal wife.

Cases referred to

1 *Lam Wai Hwa & Anor* v *Toh Yee Sum & Ors* [1983] 2 MLJ 302 (folld)
2 *Re Ho Khian Cheong* [1963] MLJ 316 (folld)
3 *Ngai Lau Shia @ Low Hong Sian* v *Low Chee Neo* [1921] 14 SSLR 37 (refd)
4 *Cheang Thye Pin & Ors* v *Tan Ah Loy* [1920] AC 369 (refd)
5 *In the Estate of Yeow Kian Kee (deceased); Er Gek Cheng* v *Ho Yin Seng* [1949] MLJ 171 and 174 (distd)
6 *In re Lee Siew Kow, deceased; Yeo Siew Neo (w)* v *Gan Eng Neo (w)* [1952] MLJ 102 (distd)
7 *Re Lee Gee Chong (deceased); Tay Geok Yap* v *Tan Lian Cheow* [1969] MLJ 102 (distd)
8 *Watt* v *Thomas* [1947] All ER 582 (refd)
9 *Benmax* v *Austin* [1955] 1 All ER 326 (refd)
10 *Tithes Dental a Photo Supply Sdn Bhd* v *Expresa Lineas Maritimes Argentinas & Ors* [1977] 1 MLJ 13 (refd)
11 *Chow Yee Wah & Anor* v *Choo Ah Pat* [1978] 2 MLJ 41 (refd)
12 *Lim Kim Chet & Anor* v *Multar bin Masngud* [1974] 2 MLJ 165 (refd)
13 *Choo Kok Beng* v *Choo Kok Hoe* [1984] 2 MLJ 165 (refd)

HE Cashin (*MS Miki Goh* (*Ms*) with him) for the appellants in Supreme Court Civil Appeal No 30 of 1988.
GS Nijar (*Tan Khek Peng* with him) for the appellants in Supreme Court Civil Appeal No 31 of 1988.
Lim Chor Pee for the respondents.
Goh Eng Kee watching brief for the trustees.

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): This appeal is against the decision of Anuar J declaring that the two plaintiffs were the children of Datuk Yeap Hock Hoe by Hooi Sooi Wan, his principal